

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6191

APPEAL OF KENSINGTON VOLUNTEER FIRE DEPARTMENT, INC.

OPINION OF THE BOARD

(Hearing held May 2, 2007)
(Effective Date of Opinion: July 17, 2007)

Case No. A-6191 is an administrative appeal filed by A. Michael Kelly and Kenneth D. Smith on behalf of the Kensington Volunteer Fire Department, Inc. (collectively referred to as the "Appellant"). The Appellant charges administrative error on the part of the County's Department of Permitting Services ("DPS") in issuing its Notice of Violation, dated November 16, 2006, regarding an electronic sign with a variable message. The subject property is located at 10620 Connecticut Avenue, Kensington, Maryland 20895 (the "Property"), in the R-60 zone.

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on the appeal on May 2, 2007. Kenneth D. Smith, Esquire, represented the Appellant. Assistant County Attorney Malcolm Spicer represented DPS. A. Michael Kelly testified on behalf of the Appellant. Pete Hrycak testified on behalf of DPS.

Decision of the Board: Administrative appeal **denied**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The subject Property is located at 10620 Connecticut Avenue, Kensington, Maryland, 20895.
2. Mr. Pete Hrycak testified for the Department of Permitting Services. He has been a permitting services inspector with DPS for eleven years. He testified that he responds to complaints about signs, including signs in Kensington. He testified that over the past year, he has responded to approximately 12 sign complaints in Kensington.

Mr. Hrycak testified that he issued the November 16, 2006, Notice of Violation. See Exhibit 10, page 3. He testified that DPS had received a complaint about a sign with a message that changed. He testified that he spoke with Mr. Kelly at the fire department, and told him that (pursuant to the County's Sign Ordinance) the sign couldn't change messages more than one time per day. He testified that Mr. Kelly told him that he (Mr. Kelly) understood that the Kensington Code superseded County law. Mr. Hrycak testified that DPS continued to receive complaints about the sign, and that he observed that it changed more than one time per day, from "Breakfast with Santa" to information about the date and time for the event. He testified that he issued a Notice of Violation to the fire department for violating section 59-F-4.1(f)(5) of the Montgomery County Zoning Ordinance (Sign Ordinance), which addresses message replacement for illuminated signs.¹ See Exhibit 11.

Mr. Hrycak testified that the Kensington Volunteer Fire Department had applied to the Sign Review Board for a variance from the applicability of the section 59-F-4.1(f)(5), "message replacement." See Exhibit 10, page 4. He testified that a hearing on that variance request was held on February 10, 2005, and that the variance was approved with the condition that the sign could not be changed more than one time per day except in the case of an emergency, such as an Amber alert. He testified that the Mayor of Kensington had written a letter in support of the variance. See Exhibit 10, page 11. The Mayor's letter expressed support for a variable message sign to supply emergency notices.

In response to questioning on cross-examination, Mr. Hrycak testified that the Town of Kensington had not complained about the sign in question, and that the Town has not asked the County to enforce the Sign Ordinance against places of worship, fire departments, or the Town itself. He testified that the Town had complained to DPS that the side of a parked truck was being used as a sign

3. Mr. A. Michael Kelly, the administrative officer for the Kensington Volunteer Fire Department, testified for the Appellant regarding the sign in question. Mr. Kelly testified that there was a committee in charge of replacing the sign, and that that committee managed four fire departments, one in the Town of Kensington, and three outside of the Town. He testified that once the sign at issue in this proceeding was in place, the committee asked for an exemption, and were told to go through the Sign Review Board for a variance. He testified that they asked the Mayor to write a letter in support of the variance request. He testified that the restrictions on the variable message affect the intent of the sign.

To illustrate his experience with the interplay between the County and Kensington Codes, Mr. Kelly testified that when the fire department went to the County for a permit to pave their driveway, they were told not to go to the County because their property was located in the Town of Kensington. He also testified that with

¹ Section 59-F-4.1(f)(5) states that "[s]igns that have characters which are changed manually or electronically must not be changed more than once each day. This includes a sign that gives the appearance or illusion of movement for a written or printed message."

respect to the County's smoking ban, everyone assumed the Town was exempt until they realized that they (the Town) had excepted themselves for health code provisions from the general exemption, and thus that the County laws regarding health (including smoking) applied in the Town.

Mr. Kelly testified that the Town wanted the provisions of Article 59-F to apply in the Town, but that the Town wanted to enforce those provisions itself. He testified that he had witnessed enforcement actions taken by the Town against illegal signs. He testified that the County provisions are referenced in the Kensington Code to avoid having to replicate them in their entirety.

4. Appellant timely filed this appeal to the Board of Appeals.

SUMMARY OF ARGUMENTS

1. Mr. Malcolm Spicer argued on behalf of DPS. He argued that the Town of Kensington has not exempted itself from the applicability of Article 59-F of the County Code (the Sign Ordinance). He stated that Kensington has enacted some code provisions pertaining to signs, but that the Town had not enacted a provision which would supersede the County's regulation of message replacement in Section 59-F-4.1(f)(5). See Exhibit 10, at pages 7-10 (sections 6-101 through 6-104 of the Kensington Code of Ordinances). He argued that as a matter of law, the provisions in the Kensington Code only supersede the County's Sign Ordinance where the two are in conflict.

Mr. Spicer stated that Section 6-101(a) of the Kensington Code says that the Town shall have the power to enforce the provisions of Chapter 59, Article F, of the County Code.² He argued that this is an adoption by reference of the County's Sign Ordinance. He stated that the Town relies on DPS to do sign enforcement. He argued that the Mayor's letter to DPS, supporting the fire department's sign variance request, indicates that the Mayor thinks that the Town is subject to the County's Sign Ordinance. He argued that the fact that the Appellant sought a variance from the County for their sign indicates that the fire department itself believed it was subject to the County's Sign Ordinance.

Mr. Spicer stated that he didn't see where Kensington had adopted an exemption from the applicability of the County Sign Ordinance for fire departments, places of worship, etc.

² Section 6-101(a) of the Kensington Code of Ordinances provides that: "(a) The Town shall have the power to enforce the provisions of Chapter 59, Article F of the Montgomery County Code (latest edition), entitled "Signs" which provides for the regulation of same, except as otherwise provided in this Code.

2. Mr. Kenneth Smith argued on behalf of the Appellant. He stated that Article 23A of the Maryland Code Annotated provides that a home rule municipality can exempt itself from otherwise applicable laws.³ Mr. Smith stated that Section 1-202(a) of the Kensington Code states that the Town exempts itself from the laws of Montgomery County except those that have been expressly adopted. He stated that Section 1-202(b) provides that this exemption does not preclude the Town from entering into an agreement with the County for enforcement.⁴

Mr. Smith argued that it is not clear from the language in section 6-101 that the Town intended the Montgomery County Sign Ordinance to be an exception to the exemption. He asserted that where the statutory language is unclear, one should look at the statutory structure. He stated that everywhere else in the Kensington Code, exceptions to the Town's general exemption from the laws of Montgomery County are very clearly set forth. He cited as an example of the language used in these exceptions the adoption by the Town of the County's electrical code, set forth in Section 5-301 of the Kensington Code:

Section 5-301. Montgomery County Electrical Code Adopted.

- (a) Chapter 17 of the Montgomery County Code (1984 edition) entitled "Electricity" which regulates the installation of certain electrical apparatus for light, heat or power, or power supply to radio and television transmitting and receiving stations in or on buildings, structures, and outdoor properties, including any future amendments, revisions, or changes thereto, *is hereby adopted and made part of this Code by reference*, except as otherwise provided in this Code.

³ Mr. Smith was presumably referring to Section 2B(a) of Article 23A, which reads as follows:

§2B. Application of county legislation to municipalities

- (a) County legislation made inapplicable in municipality. -- Except as provided in subsection (b) of this section, legislation enacted by a county does not apply in a municipality located in such county if the legislation:
 - (1) By its terms exempts the municipality;
 - (2) Conflicts with legislation of the municipality enacted under a grant of legislative authority provided either by public general law or its charter; or
 - (3) Relates to a subject with respect to which the municipality has a grant of legislative authority provided either by public general law or its charter and the municipality, by ordinance or charter amendment having prospective or retrospective applicability, or both:
 - (i) Specifically exempts itself from such county legislation; or
 - (ii) Generally exempts itself from all county legislation covered by such grants of authority to the municipality.

⁴ Sections 1-202(a) and (b) of the Kensington Code of Ordinances read as follows:

Section 1-202 References to the Laws of Other Jurisdictions.

- (a) Pursuant to Article 23A of the Annotated Code of Maryland, the Town of Kensington, effective October 29, 1984, exempts itself from the provisions of all laws of Montgomery County enacted before or after that date and dealing with matters in which the Town is lawfully empowered by State law or its own Charter to act, except those laws of Montgomery County defined by Maryland law to apply and those which have been expressly adopted by reference by the Town in this Code of Ordinances.

- (b) This exemption shall not prevent the Town from reaching mutual agreement with Montgomery County for the enforcement of specific laws of the County or Town by County officials or their agents.

- (b) This Section *is an exception to the general exemption* enacted by the Town of Kensington in Section 1-202 of this Code.
- (c) The Town hereby *requests and authorizes Montgomery County* to enforce the provisions of this Section.
- (d) A copy of Chapter 17 of the Montgomery County Code shall be kept in the Town office and shall be made available during normal business hours.
(emphasis added)

He stated that this language, specifically creating an exception to the general exemption in Section 1-202, is repeated in 30 other provisions of the Kensington Code. See Exhibit 4 (list). He noted that unlike all of the other exception provisions, the language in Section 6-101 of the Kensington Code regarding the County Sign Ordinance does not specify that it is an exception to the general exemption in Section 1-202. He argued that the language in Section 6-101 should be interpreted to say that Kensington adopts a sign ordinance that is the same as that of the County, with some additions, and that Kensington will enforce it. He cited to the Town's internet web site, which lists enforcing municipal codes with respect to illegal signs as one of the responsibilities of the Town's Code Enforcement Department. See Exhibit 9, page 4. He stated that the Town has an enforcement person. Thus he argued that the provisions of the County's Sign Ordinance do apply, but as enforced by Kensington, and stated that Kensington has chosen to exempt certain places, including the fire department, from their applicability.⁵

Mr. Smith also argued that if the County were to have enforcement authority over this sign, that the term "message," as used in Section 59-F-4.1(f)(5) of the County Sign Ordinance, should be read to refer to the "message" as a whole, not to that portion of a single "message" which is able to be displayed on the sign at a single time.

Mr. Smith asserted that the fire department sought a sign variance from the County after receiving a Notice of Violation regarding the sign. He stated that as he understood it, getting a variance was perceived as the easiest way to resolve the Notice, and that had he been counsel to the Town at that time, the fire department would not have sought the variance.

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-4.3(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be

⁵ Section 6-104 of the Kensington Code states, in relevant part, "Signs installed by the Town of Kensington or signs at fire stations, places of worship and public libraries are exempt from Section 6-104 titled Signs on Private Property."

considered *de novo*. The burden in this case is therefore upon the County to show that the Notice of Violation was properly issued.

2. Section 59-F-4.1(f)(5) of the Montgomery County Code, captioned "Message Replacement," provides that a sign that has characters which are changed manually or electronically must not be changed more than once each day.
3. Undisputed testimony indicates that the text displayed at a single time on the sign in question did change more than one time per day, although as noted above, there was some disagreement as to whether the change of text constituted a change in "message." While the heading to Section 59-F-4.1(f)(5) ("Message Replacement") may be open to interpretation, the Board finds that heading is not the law, and that the actual language used in the body of Section 59-F-4.1(f)(5) is very clear. The text of that section speaks of characters which are changed manually or electronically, and prohibits any such changes more than one time per day. The Board finds that the plain language of this provision means that the characters on the sign are not to change more than once a day. In other words, a sign which rotates between displaying "Breakfast with Santa" and alternately displaying the date and time for the event, has characters which change more than once a day, and thus is clearly impermissible under Section 59-F-4.1(f)(5).
4. The argument in this case centered on whether or not Montgomery County has jurisdiction to enforce its Sign Ordinance in the Town of Kensington. The Board finds that the language used in section 6-101 of the Kensington Code of Ordinances adopts Article 59-F of the Montgomery County Code by reference, as contemplated by section 1-202 of the Kensington Code, and permits the Town to enact supplemental provisions regarding signs:

Section 6-101. Signs and Billboards

- (a) The Town shall have the power to enforce the provisions of Chapter 59, Article F of the Montgomery County Code (latest edition), entitled "Signs" which provides for the regulation of same, except as otherwise provided in this Code.
- (b) Article 23A of the Annotated Code of Maryland provides that municipalities may make regulations for various purposes including signs.
- (c) The following Articles contain additional requirements that supplement portions of Chapter 59, Article F of the Montgomery County Code. In cases of conflict, the following Articles shall supersede and take precedence over Chapter 59, Article F of the Montgomery County Code.

The language in this Section makes clear that in addition to the provisions of Chapter 59, Article F, Kensington has enacted some supplemental requirements regarding signs, and that if and where these additional requirements conflict with the County's sign requirements, they shall supersede and take precedence over the County law. The Board finds that this language makes clear that the County's Sign Ordinance, found at Chapter 59, Article F of the County Code, applies in the Town of Kensington except where it is superseded by additional and conflicting

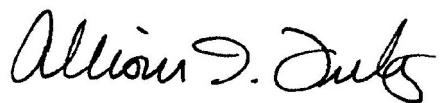
provisions enacted by the Town. The Board finds that the repeated references in this Section to Chapter 59, Article F, support his conclusion and presume that Chapter 59, Article F, applies in the Town. In addition, the Board notes that the actions of the Kensington Fire Department, in seeking a variance under the County's Sign Ordinance for a variable message sign, and the letter to the County from the former Mayor, supporting the requested sign variance, evidence a belief on the part of both the Fire Department and the former Mayor that the County's Sign Ordinance applies in the Town.

The Board finds that Section 6-104 of the Kensington Code, which exempts fire departments from the applicability of the supplemental sign provisions added by that Section to the provisions of Article F of Chapter 59, has the effect of placing the Appellant under the more general jurisdiction of Section 6-101 (i.e., the County's Sign Ordinance).

5. Despite evidence that other sections of the Kensington Code of Ordinances use different language to indicate exceptions to the general exemption provided by Section 1-202 from the provisions of the County Code, the Board is not persuaded that the language used in those sections is the only way in which to set out such an exception, and reaffirms its conclusion, set forth above, that the language used in Section 6-101 also creates such an exception.
6. Based on the foregoing, namely that undisputed evidence of record indicates that the characters on the sign in question changed more than one time a day, that such changing of characters is a violation of Section 59-F-4.1(f)(5) of the County's Sign Ordinance, and that the Appellant is subject to the County's Sign Ordinance, the Board finds that DPS has met its burden of demonstrating by a preponderance of the evidence that the Notice of Violation, dated November 16, 2006, regarding an electronic sign with a variable message at the subject Property, was properly issued. The appeal in Case A-6191 is therefore **DENIED**.

On a motion by Member Caryn L. Hines, seconded by Member Catherine G. Titus, with Chairman Allison I. Fultz, Vice Chairman Donna L. Barron, and Member Wendell M. Holloway in agreement, the Board voted 5 to 0 to adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the Opinion stated above be adopted as the Resolution required by law as its decision on the above-entitled petition.



Allison I. Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 17th day of July, 2007.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.